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आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क: O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं. / O.I.O. No.	दिनांक / Date
	V2/97/RAJ/2017	47/ST/2016-17	19.01.2017

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130 & 151

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-146-2017-18

आदेश का दिनांक / Date of Order:	22.12.2017	जारी करने की तारीख / Date of issue:	26.12.2017
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथ आयुक्त/ सयुक्त आयुक्त/ उपआयुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जयनगर / गन्धीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellant & Respondent :-**
M/s. Navbharat Travel Agency, Space Building, Nr. Ajay Apartment 20, Jagnath Plot, Dr. Yagnik Road- 360003 Rajkot

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत निम्नलिखित जगह की जा सकती है। /
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) सर्वोच्च न्यायालय से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जाती चाहिए। /
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहामनी भवन असावा अहमदाबाद, 380016 को की जाती चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asawa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अन्तर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा, व्याज की सीमा और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करे। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सर्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी है, उसकी प्रति साथ में संलग्न करे। (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की सीमा, व्याज की सीमा और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करे। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सर्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /
The appeal under sub-section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धारा (2) एवं (2A) के अंतर्गत दत्त की वही अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T.-7 में की जा सकती एवं उसके साथ आवृत्त, केन्द्रीय उत्पाद शुल्क अध्याय अधुक्त (अपील) केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (जहाँ से एक प्रति प्रस्तावित होगी चाहिए) और आवृत्त द्वारा सहपत्रक आवृत्त अध्याय अधुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलार्थ न्यायाधिकरण को अर्पित दत्त करने का निर्देश देने वाले आदेश की प्रति को साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण (सेस्टैट) के प्रति अपील के प्रारम्भ में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35EE के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलार्थ न्यायाधिकरण में अपील करते समय उत्पाद शुल्कसेवा कर मूल के 10 प्रतिशत (10%), जब मूल एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'जान किरा गरा शुल्क' से निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेस्टैट जमा की गई राशि
- (iii) सेस्टैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त यह कि इस धारा के प्राधान्य वित्तीय (सं. 2) अधिनियम 2014 के अंश में पूर्व किसी अपीलार्थ न्यायाधिकरण के समक्ष विचारार्थीय रकम अर्पित एवं अपील को लागू नहीं होगी।
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include:

- (i) amount determined under Section 11 D,
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षण चर्चा निम्नलिखित प्रस्ताव में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पारक के अंतर्गत अर्पित सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, लोधी मंजिल, जौहन टॉप भवन, संसद भवन, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case: governed by first proviso to sub-section (1) of Section-35B ibid.

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी करखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य करखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी करखाने या किसी भंडार गृह में माल के नुकसान के प्रसंग में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर अर्पित केन्द्रीय उत्पाद शुल्क के कूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किया बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) अनुसूचित उत्पाद के उत्पादन शुल्क के अंतर्गत के लिए जो हुपट्टी केन्द्रीय उत्पाद शुल्क अधिनियम एवं इसके विभिन्न प्रावधानों के तहत लागू की गई है और ऐसे आदेश जो आवृत्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई लाठीध अथवा सहायकिय पर वा बट में पारित किए गये हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां पत्र संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संघर्ष के 3 महीने के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साध्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Chalan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का संश्लेषण है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त इन में किया जाना चाहिए। इस संघर्ष के होने हए भी की विचार नहीं करने से बचने के लिए स्वतंत्रित अपीलार्थ न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) पदासथायित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण (बाबी विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को अभिमानित करने वाले नियमों की और भी व्यापक आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलार्थ न्यायाधिकरण को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

:: ORDER IN APPEAL ::

M/s. Navbharat Travel Agency, Space Building, Near Ajay Apartment, 20-Jagnath Plot, Dr. Yagnik Road, Rajkot (hereinafter referred to as 'the appellant') has filed the present appeal, against Order-In-Original No. 47/ST/2016-17 dated 19.01.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as 'the lower adjudicating authority').

2. Briefly stated the facts of the case are that, based on 'third party data' received from CBEC for the year 2010-11, Show Cause Notice No.V.ST/AR-STAR-I/RJT/ADC(PV)/190/2015-16 dated 07.03.2016 was issued to the appellant demanding of service tax of Rs. 5,47,103/- under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "Act") along with interest under Section 75 of the Act and to impose penalties under Section 77(1), Section 77(2), Section 76 and Section 78 of the Act and to impose penalty upon Shri Nimeshbhai D. Keshariya, Partner of the appellant under Section 77(2) of the Act. It was found that SCN was issued on the ground that scrutiny of documents viz. Form 26AS, Audit Report, Balance Sheet, Sample invoices raised for providing taxable services and ST-3 returns submitted by the appellant revealed that the appellant had not paid service tax on the commission received on booking of travel and hotels for the year 2010-11 to 2014-15. The SCN was adjudicated by the lower adjudicating authority vide impugned order wherein he confirmed demand of service tax of Rs. 5,47,103/- under proviso to Section 73(1) of the Act along with recovery of interest under Section 75 of the Act, and imposed penalties under Section 77(2), 77(1)(a), 77(1)(b) and Section 78 of the Act.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal, *inter alia*, on the following grounds:

(i) The impugned notice proposing demand of service tax for the services classifiable under 'Business Auxiliary Service' as defined under Section 65(19) of the Act read with Section 65(105) (zzb) of the Act and alleged that the appellant has received Rs. 56,11,377/- as Commission. In fact, the appellant has received commission income of Rs. 37,50,905/- only during the period from 2010-11 to 2014-15, which are verifiable with Form 26AS which was relied upon by the department. However, the lower adjudicating authority has mechanically confirmed demand on entire income of Rs. 56,11,377/-, which includes income under the other head of receipt as well treating it as commission received.

(ii) The lower adjudicating authority vide Para 12 to Para 14 held that Service Tax was payable on Commission received by the appellant. Whereas, commission earned by the appellant is well below the threshold limit and hence no Service Tax was payable. There is no proposal in the impugned Show Cause Notice for any other category of service and the impugned order mentioned that the appellant received Rs. 56,11,377/- as Commission and

service tax liability was worked out to be Rs. 5,47,103/- whereas the appellant had received the amount under the head Commission under section 194H as shown in form 26AS, which is well below the threshold limit and hence no tax was payable by the appellant.

(iii) The lower adjudicating authority has erred in taking view that all income received by the appellant are commission income and provisions of Income Tax Act does not make any difference. By holding so, the lower adjudicating authority has rejected the provisions of Income Tax Act and in that case, Form 26AS obtained by the department has lost its relevance.

(iv) The SCN proposed to tax only those income which the appellant had received as 'commission' acting on behalf of other tour operators and never proposed to tax income which the appellant had earned as Tour Operator. The statement 26AS covers both types of income of the appellant and demand in the present case is entirely based on 26AS statements of the appellant. It was submitted that demand cannot be confirmed beyond the scope of SCN relying on decision in the case of Ballarpur Industries reported as 2007 (215) ELT 489 (SC).

(v) The lower adjudicating authority has clearly overlooked submissions of the appellant and mechanically confirmed the demand as he has not considered the fact that services of Tour operator provided by the appellant is eligible for abatement as per Notification No. 1/2006-ST dated 01.03.2006 and Notification No. 26/2012-ST dated 20.06.2012. If the abated value of the service is considered then the appellant is eligible for small scale exemption under Notification No. 6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012. The order also ignored that certain income reflected in their 26AS statements is erroneous and they have never provided such services to anyone. The appellant had submitted in detail the summary of income received as Commission and income received as Tour operator, however the same has not been considered in the impugned order. Therefore, the impugned order is non-speaking order and liable to be set aside. The appellant relied on decisions of Hon'ble Supreme Court in the case of Cyril Lasardo (Dead) reported as 2004 (7) SCC 431 and Shukla & Brothers reported as 2010 (254) ELT 6 (SC).

(vi) The consideration which the appellant has received is to be considered as inclusive of service tax payable as held in the case of Sri Chakra Tyres reported as 1999 (108) ELT 361 duly affirmed by Hon'ble Supreme Court reported as 2002 (142) ELT A279 (SC); decision of Hon'ble Apex Court in the case of Maruti Udyog Limited reported as 2002 (49) RLT 1 (SC) and decision of CESTAT, Kolkata in the case of Advantage Media Consultant reported as 2008 (10) STR 449 (Tri. - Kolkata) duly affirmed by Hon'ble Supreme Court reported as 2009 (14) STR J49 (SC).

(vii) No penalty can be imposed under Section 77 of the Act as none of the conditions specified therein has been met. The appellant has provided all details as and when desired

by the department and the appellant at no point of time had the intention to evade Service Tax or suppressed any fact willfully from the knowledge of the department. The appellant was and still has bonafide belief that the service in question is excluded from levy of service tax and therefore penalty under Section 78 of the Act cannot be imposed. The appellant relied on following case laws: -

- Suvikram Plastex Pvt. Ltd. – 2008 (225) ELT 282 (T)
- Rallis India Ltd. – 2006 (201) ELT 429 (T)
- Patton Ltd. – 2006 (206) ELT 496 (T)
- Satguru Engineering & Consultants Pvt. Ltd. – 2006(203) ELT 492 (T)
- Indian Hume Pipes Co. Ltd. – 2004 (163) ELT 273 (T)
- Akbar Badruddin Jiwani – 1990 (47) ELT 161 (SC)
- Chemphar Drugs and Liniments – 1989 (40) ELT 276 (SC)
- Ispat Industries Ltd. – 2006 (199) ELT 509 (Tri. – Mum.)
- Sikar Ex-serviceman Welfare Coop. Society Ltd. – 2006 (4) STR 213 (Tri. – Del.)
- Haldia Petrochemicals Ltd. – 2006 (197) ELT 97 (Tri. – Del.)

(viii) There was a bonafide belief on their part that impugned activities were not subject to service tax, therefore, there was reasonable cause for failure. Hence, in terms of Section 80 of the Act, penalties cannot be imposed under Section 77 and Section 78 of the Act. The appellant relied on following case-laws: -

- ETA Engineering Ltd. – 2004 (174) ELT 19 (Tri. – LB)
- Flyingman Air Courler Pvt. Ltd. – 2004 (170) ELT 417 (T)
- Star Neon Singh – 2002 (141) ELT 770 (T)

(ix) The demand of service tax confirmed under the impugned order is not maintainable and therefore, interest under Section 75 of the Act is also unsustainable.

4. The department has submitted comments on Grounds of Appeal wherein it has been submitted as under: -

(i) The demand has been raised on gross income received by the appellant from their various principals rendering same services, there was no record that the appellant had earned income from other head or providing other services. Thus, nature of service provided by the appellant was same and the income received for providing the same taxable service under two different heads of the Income Tax Act does not make any difference.

(ii) The appellant is engaged in providing taxable service under Section 69 of the Act under the category of "Business Auxiliary Service" classifiable under Section 65 (19) of the Act and is taxable under Section 65 (105) (zzb) of the Act and has received 'commission' on providing their services related to booking of tour/travels and hotels on behalf of the travel companies,

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which was taxable income. Accordingly, Show Cause Notice was issued to the appellant and demand confirmed vide impugned order.

(iii) The impugned order was issued on the basis of merit of the case, records available and after considering written and oral submissions made by the appellant. Hence, question of gross violation of principles of natural justice does not arise. The ratio of relied upon decisions cannot be applied in the present matter,

(iv) The appellant has not provided the services as Tour Operator and hence the contention made by the appellant is without any basis and is liable to be rejected.

(v) The benefit of threshold income has already been provided to the appellant while computing the liability of service tax during the year 2010-11.

(vi) The details of services provided by the appellant was detected on the basis of investigation made by the department and it is clear that the appellant failed to payment of service tax and violated the provisions of the Act and Rules framed thereunder. Hence, penalty under Section 77(2) and Section 78 of the Act is rightly imposed. There is catena of judgments wherein it has been held that in case of non-payment of duty/tax with intent to evade the same, penalty is imposable.

5. Personal hearing in the matter was attended to by Shri Sharad T. Anada, Chartered Accountant, who reiterated the Grounds of Appeal and submitted that SCN has alleged Service Tax on Commission only and not as Tour Operator on their own; since the SCN has not alleged Service Tax as Tour Operator, the income generated by it cannot be confirmed/demanded in Order-in-Original; that commission income as travel agent is below threshold limit of Rs. 10 lakhs and hence no demand survives; that the impugned order needs to be set aside as nothing has been suppressed by them and hence extended period of limitation is not applicable in this case. However, no one appeared from the department during P.H. despite P.H. notices issued to the department.

FINDINGS:



6. I have carefully gone through the facts of the case, impugned order, appeal memorandum and written as well as oral submissions made by the appellant. The issue to be decided is whether in the facts and circumstances of the present case, the impugned order passed by the lower adjudicating authority confirming non-payment of service tax under the category of "Business Auxiliary Service" under Section 65(105) (zzb) of the Act is correct or not.

7. I find that the SCN has alleged non-payment of service tax on Commission Income of Rs. 56,11,377/- during financial years 2010-11 to 2014-15 towards providing services of travel

and hotel booking to various customers on behalf of their principals. The lower adjudicating authority has confirmed the demand of service tax by holding that the appellant had provided their services to promote/market the services provided by their various principals and in turn received commission income classifiable under 'Business Auxiliary Service'. The appellant assailed the impugned order by contending that they had received Rs. 37,50,905/- under the head of commission under section 194H of the Income Tax Act, 1961, as shown in Form 26AS, which is well below the threshold limit and hence no tax was payable. The appellant has submitted copy of 26AS for all Financial years from 2010-11 to 2014-15 to substantiate their claim. On perusal of Form 26AS for each financial year under dispute, I find that the Appellant has, in fact, received income of Rs. 38,05,633/- where the customers have deducted TDS under Section 194H of the Income Tax Act, 1961 and the appellant has received income of Rs. 18,06,290/- where the customers have deducted TDS under Section 194C of the said Act. The appellant has contended that they have undertaken two different activities; (i) acted as travel agent to provide services of travel and hotel booking on behalf of their principals and received commission income; and (ii) acted as tour operator to provide services of Tours & Travels to their customers and they have received income towards the services rendered by them on their own. I find that the appellant was put to notice that they have provided 'Business Auxiliary Service' and earned commission income which is liable to service tax but SCN was silent about the fact that the appellant has provided services of tour operator. The lower adjudicating authority has confirmed the demand on entire income by treating the said income as commission income liable to service tax under the category of 'Business Auxiliary Service', though the appellant had also provided Tour Operator service as well, which is altogether different service defined under the Act. I further find that in response to grounds of appeal of the appellant, department has offered comments and submitted that the appellant has not provided the services as Tour Operator. Service tax on value of Tour Operator service has not been specified in the SCN and also not discussed in the impugned order. Therefore, service tax cannot be demanded on value of Tour operator's service as the same has not been demanded in the impugned SCN. Hence, I find that the lower adjudicating authority has travelled beyond the scope of impugned SCN as whatever the income mentioned in Form 26AS, which has been relied upon by the department for issuance of SCN, is having combination of income generated towards providing aforesaid services i.e. 'Business Auxiliary Service' and 'Tour Operator service'. I rely on decision of Hon'ble CESTAT, Mumbai in the case of R.K. Construction reported as 2016 (41) STR 879 (Tri. – Mumbai) wherein it has been held that:-

4. On perusal of the records, we do find that the *show cause notice issued to the appellant indicates that the classification of the services is to be considered, under the category of 'Commercial or Industrial Construction Services' and directed the respondent to show cause why it should not be done so whereas the adjudicating authority has confirmed the demand of service tax on "Construction of Residential Complex" service which, the first appellate authority has correctly held that the*

adjudicating authority has traversed beyond the allegation of the show cause notice. If the assessee is not put to notice under which category the service tax sought to be demanded, the conclusion reached by the first appellate authority is correct and does not suffer from any infirmity. Be that as it may, we also find that the contract which has been entered by the respondent is a "works contract" and the entire contract has been executed prior to 1-6-2007. In our view the issue is no more res integra as the judgement of the Hon'ble Apex Court in the case of CCE v. Larsen and Toubro Ltd and Ors. - 2015-TIOL-187-SC-ST = 2015 (39) S.T.R. 913 (S.C.) it has been held that works contract cannot be vivisected prior to 1-6-2007 for taxing separately.

(Emphasis supplied)

7.1 The Hon'ble CESTAT, New Delhi in the case of Balaji Contractor reported as 2017 (52) STR 259 (Tri. – Del.) has held that:

7. We have heard both the sides and perused the appeal records. Admittedly, the show cause notices issued to the appellant sought to demand/recover Service Tax under the taxable category under Cargo Handling Services. The proposal was made after due examination of the scope of services rendered by the appellant. The same was confirmed by the original authority. On appeal, the first appellate authority examined the same scope of services, reclassified it under new categories of manpower supply and Goods Transportation Agency services. We note that the tax entry of each type of service has got legal implications with reference to tax liability, classification, quantification, exemption, abatement, etc. It is for this reason, the assessee should be put to notice about the correct classification under which the demand was sought to be made, so that defence can be made to reply for such allegation. Admittedly, in the case involved in the present proceeding, no such proposal to demand Service Tax in GTA services or manpower supply service has been made by the department. As such, the impugned order which travelled beyond the scope of show cause notice is not sustainable on this legal ground alone. We rely on the decision of Hon'ble Karnataka High Court in the case of Mahakoshal Beverages Pvt. Ltd. (supra).

(Emphasis supplied)

7.2 The Hon'ble CESTAT, Ahmedabad in the case of Trichem Enterprises Pvt. Ltd. reported as 2016 (46) STR 592 (Tri. – Ahmd.) has held that: -

6. So far as levibility of service tax on the commission received by the appellant under Business Auxiliary Services (BAS) is concerned appellant has admitted that the service tax was leviable during the relevant period. However, it was appellant's case that the benefit of value based exemption Notification No. 6/2005-S.T., dated 3-1-2005 was admissible to the appellant during the year 2006-07 and the differential service tax for the services provided in excess of Rs. 4 lakhs, provided during the financial year 2006-07, has already been paid by the appellant. The exemption limit of Rs. 4 lakh was enhanced to Rs. 8 lakhs w.e.f. 1-4-2007 vide Notification No. 4/2007, dated 1-3-2007. It is observed that the total amount received towards services provided was only Rs. 6,58,100/- during 2007-08 which was less than the exemption limit of Rs. 8 lakhs. From the above facts, it is evident that appellant was eligible to the exemption during the financial year (2007-08). First appellate authority has, however, denied the exemption on the grounds that the appellant has not fulfilled the conditions specified in para 2 of exemption notification. On this aspect appellant has argued that appellant was not put to notice on any occasion that they did not fulfil the conditions specified in the exemption Notification No. 6/2005-S.T., dated 1-3-2005 as amended. It is observed from the show cause notice dated 9-6-2010 issued to the appellant that it is not brought out anywhere in the show cause notice that appellant has not fulfilled the conditions specified under exemption Notification No. 6/2005-S.T. It is also observed that appellant in their defence reply before the adjudicating authority claimed the benefit of exemption under Notification No. 6/2005-S.T., dated 1-3-2005. In view of the above appellant was never put to notice during the adjudicating proceeding to explain as to how the conditions


specified in exemption Notification No. 6/2005-S.T. were not fulfilled. Adjudicating authority and the first appellate authority have, therefore, gone beyond the scope of show cause notice in confirming the demands on those grounds which were not specified in the show cause notice.

(Emphasis supplied)

8. The appellant has contended that commission earned by them is well below the threshold limit and hence no Service Tax is payable. I find that the commission income received for rendering services of travel and hotel booking on behalf of their principals is below the threshold limit of exemption from payment of service tax during each financial year and the income earned by providing services of tour operator by the appellant on their own has not been provided/specified in the SCN. The appellant is entitled for benefit of exemption as provided under Notification No. 6/2005-ST dated 01.03.2005 and Notification No. 33/2012-ST dated 20.06.2012. I also find that the lower adjudicating authority has incorrectly confirmed demand of service tax under the category of 'Business Auxiliary Service' by considering entire income as commission income. Thus, the appellant is not liable to pay service tax on this commission income under the category of 'Business Auxiliary Service' taxable under Section 65(105) (zzb) of the Act. Once the confirmation of demand of service tax under the category of 'Business Auxiliary Service' is held as not tenable, question of recovery of interest and imposition of penalty would not survive. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

९. अपीलकर्ता द्वारा दर्ज की गई अपीलस का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeals filed by the appellant stand disposed off in above terms.


(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To, M/s. Navbharat Travel Agency, Space Building, Near Ajay Apartment, 20- Jagnath Plot, Dr. Yagnik Road, Rajkot.	प्रति, मे. नवभारत ट्रेवल अजेन्सी, स्पेस बिल्डिंग, अजय अपार्टमेंट के पास, २०-जगनाथ प्लॉट, डा. याग्निक रोड, राजकोट
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Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST & Central Excise, Division – I, Rajkot.
4. Guard File.